United Overseas Bank (M) Sdn Bhd v Pre-Engineering Metal Building System Sdn Bhd

HIGH COURT (SEREMBAN) — ORIGINATING SUMMONS NO 24–1252 OF 2003

LOW HOP BING J

25 JULY 2005

Land Law — Sale of land — Order for — Cause to contrary — Chargor not borrower — Whether grant of order for sale of charged land would be contrary to rule of law or equity — Burden on chargor to prove

Land Law — Sale of land — Order for — Cause to contrary — Whether demand in Form 16D defective for failure to specify breach and amount due and payable — Application of conclusive evidence clause

In consideration of the plaintiff granting various facilities to the borrower, the defendant had created a charge on its land in favour of the plaintiff. As the borrower had defaulted under the facilities, the plaintiff obtained judgment against the borrower, and subsequently applied for an order of sale of the charged land. Learned counsel for the defendant submitted that: (1) the plaintiff's demand in Form 16D was defective in failing to specify the breach in question and the amount due and payable; and (2) as the defendant was not the borrower, an order for sale would be contrary to some rule of law or equity.

Held, allowing the application for order for sale:

(1) The plaintiff had expressly stated in its Form 16D the breach by the defendant of the provisions of the charge (see para 10). Furthermore, cl 16 of the Facility Agreement executed by the borrower provides for conclusive evidence of the borrower's indebtedness if the statement was certified as correct by an authorised officer of the plaintiff, as a result of which the defendant as chargor was precluded from challenging the accuracy of the amount particularised in the plaintiff's letters annexed to Form 16D in which the defendant was unable to show any manifest error (see para 17). Where the conclusive evidence clause applies, as it did in this case, there was no need for the chargee to prove the amount, but merely the fact of the chargor's inability to settle the loan, and that the allegation that the chargee's account was incorrect was irrelevant (see para 18).

(2) The burden was on the defendant to show the particular provision of the law or principle of equity which the plaintiff was said to have contravened in order to prevent the making of an order for sale, under the provisions of the National Land Code 1965 or the Rules of the High Court 1980 (see para 24). This the defendant had failed to do (see para 25).

[**Bahasa Malaysia summary**

Sebagai balasan kepada plaintif yang memberi beberapa kemudahan kepada peminjam, defendan telah menggadaikan tanahnya pinjaman kepada plaintif. Oleh sebab peminjam telah mungkir di bawah kemudahan-kemudahan itu, plaintif telah mendapatkan satu perintah terhadap peminjam dan seterusnya memohon untuk satu perintah jualan tanah yang digadai. Peguam cara bagi defendan menuntut bahawa: (1) tuntutan plaintif dalam Borang 16D mengandungi kesilapan kerana gagal menyatakan kemungkiran itu dan jumlah yang wajar dan patut dibayar balik; dan (2) kerana defendan bukan peminjam, satu perintah jualan adalah bertentangan dengan undang-undang dan rukun ekuiti.

Diputuskan, membenarkan permohonan untuk perintah jualan:

(1) Plaintif telah menyatakan dengan jelas dalam Borang 16D kemungkiran defendan terhadap peruntukan gadaian itu (lihat perenggan 10). Lebih lagi, kl 16 Perjanjian Kemudahan yang ditandatangani peminjam merupakan keterangan konklusif terhadap hutang peminjam sekiranya pernyataan disahkan sebagai betul oleh seorang pegawai sah plaintif, yang menyebabkan defendan sebagai penggadai dihalang daripada membangkang ketepatan jumlah yang dinyatakan dalam surat-surat plaintif yang bersama Borang 16D di mana defendan gagal menunjukkan sebarang kesilapan (lihat perenggan 17). Di mana klausa keterangan konklusif digunakan, pemegang gadaian tidak perlu untuk membuktikan jumlah, tetapi hanya membuktikan fakta bahawa penggadai tidak dapat menyelesaikan pinjaman dan penuduhan bahawa akaun pemegang gadaian salah adalah tidak relevan (lihat perenggan 18).

(2) Beban adalah di atas defendan untuk menujukan peruntukan undang-undang atau rukun ekuiti yang plaintif dikatakan mungkir untuk mengelak perintah jualan itu, di bawah peruntukan Kanun Tanah Negara 1965 atau Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat perenggan 24). Defendan gagal membuat sedemikian (lihat perenggan 25).]

Notes

For cases on order for sale of land, see 8(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 3799–3892.

Cases referred to

Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd [2000] 2 MLJ 113 (refd)
Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd [2004] 4 CLJ 793 (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)
Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (refd)
Multi-purpose Bank Bhd v Diamond Agreement Sdn Bhd [2000] 5 MLJ 576 (refd)

Nira Sdn Bhd v Malayan Banking Bhd [1990] 1 MLJ 110 (refd)
OCBC Bank (M) Bhd v Au Kee Sian & Anor [2002] 7 MLJ 108 (refd)
Oriental Bank Bhd v Cipta Permai Sdn Bhd [479] MD 8 (refd)
Perwira Affin Bank Bhd v Saad bin Abdullah & Anor [1999] 6 MLJ 418 (refd)
Public Bank Bhd v Noor Ehsannuddin bin Mohd Harun [2001] 5 MLJ 246 (refd)
Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd [1997] 1 MLJ 340 (refd)
Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd [1984] 1 MLJ 115 (refd)

Legislation referred to

National Land Code 1965 ss 256, (3), 340(3)(a), (b), (c), 257
Rules of the High Court 1980

HL Choon (Raja Darryl Loh) for the plaintiff.
Marguerite Rozario (Thanggaiya Zawawi & Co) for the defendant.

Low Hop Bing J:

I APPLICATION

[1] This is an application by way of originating summons in encl 1 filed by the plaintiff as the registered chargee for an order for sale of the land held under PN 9560 Lot 784 Pekan Nilai Mukim of Setul ('the land') which the defendant/chargor has charged to the plaintiff by way of a third party charge ('the charge') as security for various facilities granted by the plaintiff to V-Pile Sistem Sdn Bhd ('the borrower').

II FACTUAL BACKGROUND

[2] In consideration of the plaintiff granting various facilities to the borrower, the defendant has created the charge dated 27 December 1996 on the land in favour of the plaintiff.

[3] As the borrower had defaulted under the facilities, the plaintiff had obtained judgment against the borrower, which had been ordered to be wound up on 28 January 2003 vide Kuala Lumpur High Court Winding-up Petition No D1–28–935 of 2002.

[4] The plaintiff has subsequently issued a demand to the defendant as chargor demanding that the defendant remedy the breach but the defendant has failed to comply therewith. Hence, this charge action by the plaintiff against the defendant under s 256 of the National Land Code 1965.

[5] A reference hereinafter to a section is a reference to that section in the National Land Code 1965.

III GOVERNING PRINCIPLES

[6] The principles governing charge actions have been set out with unrivalled clarity in the judgment of the then Supreme Court delivered by Gopal Sri Ram JCA in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77. The then Supreme Court held that under s 256(3), the court shall order the sale of the land to which the charge relates unless it is satisfied of the existence of cause to the contrary, which may be established by the chargor in three categories of cases viz :

(1) the chargor comes within any of the exceptions to the indefeasibility doctrine housed in s 340 e.g. fraud or misrepresentation (under s. 340(3)(a)); forgery or insufficient or void instrument (under s 340(3)(b)); or unlawfully acquired title or interest (under s 340(3)(c));

(2) the chargee has failed to meet the conditions precedent for the making of an application for an order for sale eg chargee's failure to prove the making of a demand or service upon the chargor of the statutory notice; or where the statutory notice demands sums not lawfully due from the chargor; or

(3) the grant of an order for sale would be contrary to some rule of law or equity.

IV FORM 16D

[7] Ms M Rozario, learned counsel for the defendant, relied on principle (2) in *Low Lee Lian* and submitted that the chargee has failed to meet the conditions precedent for the making of an application for an order for sale, in that the plaintiffs demand in Form 16D is defective in failing to specify the breach in question and the amount due and payable, citing *Public Bank Bhd v Noor Ehsannuddin bin Mohd Harun* [2001] 5 MLJ 246 (HC); *Syarikat Kewangan Melayu Raya Bhd v Malayan Banking Bhd* [1984] 1 MLJ 115 (FC); and *Perwira Affin Bank Bhd v Saad bin Abdullah & Anor* [1999] 6 MLJ 418 (HC).

[8] For the plaintiff, learned counsel Mr HL Choon responded that Form 16D has clearly spelt out the defendant's breach and that the amount due and payable has been annexed to Form 16D.

[9] In my judgment, the above diametrically opposite submissions can only be resolved by a careful and meticulous examination of Form 16D which is exh LT7 at pp 199 to 207 in encl 13 which must be read and construed conjunctively.

[10] My perusal of Form 16D shows that it includes a copy of cl 2 in the annexure to the charge and the letter of demand issued by the plaintiff's solicitors. It is abundantly clear to me that the plaintiff has expressly stated the breach by the defendant of the provisions of the charge by failing to comply with:

(1) clause 2 of the annexure to the charge which concerns, inter alia, the defendant's covenant to pay the banking facility; and

(2) the letter of demand dated 4 August 2003 from the chargee's solicitors to the defendant and this letter has set out in specific particulars culminating in para 7 thereof where the amount of M6,989,084.90 was unequivocally stated

(3) as the sum demanded from the defendant as at that date.

[11] Be that as it may, the authorities cited for the defendant would call for my consideration now.

[12] In the application for an order for sale pursuant to two registered charges in *Syarikat Kewangan Melayu Raya* two issues were raised for the chargor, that:

(1) two notices in Form 16D referred to 'a charge' and not to 'charges'; and

(2) separate statutory notices should be issued for each charge.

[13] Pen Swee Chin J (later FCJ) had no difficulty in dismissing the two issues and held that the Form 16D was good and effective in law. This was affirmed by the Federal Court. In my view this judgment militates against the contention presented for the defendant.

[14] In *Perwira Habib Bank* Form 16D had claimed a sum which was not secured under the charges in that the principal and the interest clearly exceeded the sums secured under the terms of the annexure to the charge. In addition, there was no evidence of the notice of variation of interest being served on the defendants. The chargee's application for an order for sale was dismissed by Faiza Tamby Chik J.

[15] In *Public Bank Bhd* the plaintiff had granted the defendant two distinct facilities, one of which was secured by two land charges while the other was secured by a deposit of shares. The Form 16D served on the defendant required the defendant to remedy the breach with respect to both the charge and the deposit of shares. In dismissing, the plaintiffs application for an order for sale of the land in the charge, Jeffrey Tan J held that:

(1) Form 16 is available only to a registered chargee and cannot be taken out for any other purpose (eg for the deposit of shares there) and so it is defective; and

(2) the legal effect of the inclusion in Form 16D of the second overdraft which was unsecured by a charge was an additional burden on the second facility which was much heavier than the fixed loan secured by the registered charge, resulting in the defendant being prejudiced by the defect in Form 16D.

[16] The facts in two High Court judgments viz *Syarikat Kewangan Melayu Raya* and *Public Bank Bhd* are substantially different from those in this case and are in my view unsupportive of the defendant's contention.

[17] Before me, cl 16 of the Facility Agreement executed by the borrower provides for conclusive evidence of the borrower's indebtedness if the statement is certified as correct by eg an authorised officer of the plaintiff, as a result of which the defendant as chargor is precluded from challenging the accuracy of the amount particularised in the plaintiffs letters annexed to Form 16D in which the defendant is unable to show any manifest error.

[18] Where the conclusive evidence clause applies, as it does in the instant case, there is no need for the chargee to prove the amount, but merely the fact of the charger's inability to settle the loan, and that the allegation that the chargee's account is incorrect is irrelevant: *Siong Holdings Sdn Bhd v Development & Commercial Bank Bhd* [1997] 1 MLJ 340 (CA) per Abu Mansor JCA (later FCJ), following the then Supreme Court decision in *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119 per Mohd Eusoff Chin SCJ (later CJ Malaysia). (See also *Bangkok Bank Bhd v Chuan Kee Co Sdn Bhd* [2000] 2 MLJ 113 per Kamalanathan Ratnam J (as he then was)).

[19] I am therefore unable to find any merits in the above contention presented for the defendant.

V COMPLIANCE WITH LAW OR EQUITY

[20] It was stressed for the defendant that the defendant was not the borrower and so an order for sale would be contrary to some rule of law or equity under principle (3) in *Low Lee Lian*. Reference was made to *OCBC Bank (M) Bhd v Au Kee Sian & Anor* [2002] 7 MLJ 108 (HC).

[21] The stand taken for the plaintiff is that the defendant's submission is misconceived as the plaintiff has clearly established its right to an order for sale of the land.

[22] My reading of *OCBC Bank (M) Bhd* cited for the defendant shows that the plaintiff has made an application for sale of the land charged by the defendant to the plaintiff as security for various banking facilities granted by the plaintiff to a borrower. The charge was registered as a third party charge. By a letter dated 18 April 1995 (copied to the defendant), the borrower informed the plaintiff that the borrower had agreed to reduce the facilities over a period of time, such that by 31 January 1998, the charge would be redeemed and discharged. The plaintiff agreed. The defendant's bank statement showed that the defendant had paid RM205,000 and that as of 31 August 1998, the outstanding amount was only RM74,199. The plaintiff had granted further extension of the facilities on the defendant's charge. Kamalanathan Ratnam J (as he then was) held that the conduct of the plaintiff in giving further credit

after agreeing with the borrower's proposal has satisfied the court that the grant of the order for sale would be contrary to equity under principle (3) above.

[23] None of the above material facts can be found in the case before me.

[24] I am of the view that the burden is on the defendant to show the particular provision of the law or principle of equity which the plaintiff was said to have contravened in order to prevent the making of an order for sale, under the provisions of the National Land Code 1965 or the Rules of the High Court 1980.

[25] Upon a careful examination of all the affidavits and exhibits before me, I find that the defendant has failed to do so. Hence, pursuant to the governing principles enunciated in *Low Lee Lian* the plaintiff is entitled to an order for sale. Examples abound in similar circumstances in which order for sale has been made in favour of the chargee: *Nira Sdn Bhd v Malayan Banking Bhd* [1990] 1 MLJ 110; *Oriental Bank Bhd v Cipta Permai Sdn Bhd* [479] MD 8; *Century Land Resources Sdn Bhd v Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793; *Multi-purpose Bank Bhd v Diamond Agreement Sdn Bhd* [2000] 5 MLJ 576.

VI CONCLUSION

[26] In view of the fact that the defendant has not succeeded in establishing any cause to the contrary, I make an order in terms of this application and fix the auction for 26 October 2005 at the amount of RM8,327,586.54 as of today under s 257.

Order for sale allowed.

Reported by Loo Lai Mee